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CDT COMMENTS ON PROPOSED TRANSATLANTIC TRADE AND INVESTMENT AGREEMENT (TTIP)

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The Center for Democracy & Technology (CDT) submits these comments in response to USTR's April 1, 2013 request for public comments.[1] CDT is a non-profit public interest organization working to keep the Internet open, innovative, and free. In light of that mission, CDT will focus these comments on two specific matters identified in USTR's notice: item (j), regarding electronic commerce and data flow issues; and item (q), relating to trade-related intellectual property rights.

I. Overview

CDT would welcome an agreement that establishes a sound and durable framework for the robust transatlantic exchange of digital information, goods, and services. The Internet provides an unprecedented technical platform for free expression and digital commerce, but it cannot achieve its full potential without an appropriate legal framework. The United States and the members of the European Union, as leading liberal democracies with a shared historical and political alignment on the importance of protecting and furthering human rights, could establish an important international precedent and model on key Internet-related issues.

At the same time, there are some data flow and intellectual property issues that warrant significant caution and restraint. In particular, one major controversial issue related to cross-border data flows concerns the differences in data protection/privacy regimes in the US and EU. Privacy law implicates the fundamental rights of individual citizens and is currently an area of active democratic legislative consideration in both the EU and US. In a similar vein, copyright law implicates individuals' fundamental speech rights and is the subject of vigorous, ongoing democratic debate.

With respect to both privacy and copyright, therefore, TTIP negotiators should take care to avoid the appearance of trying to either (i) bypass or preempt the regular legislative process, or (ii) undermine or weaken individuals' rights. This is best done by minimizing TTIP's commitments regarding the substantive legal rules in these areas, and focusing instead on matters of fair process and equal treatment. For example, rather than trying to dictate what substantive choices the EU or US should make regarding their privacy laws, TTIP could instead seek

[1] Office of the United States Trade Representative, *Request for Comments Concerning Proposed Transatlantic Trade and Investment Agreement*, 78 Fed. Reg. 19566 (Apr. 1, 2013).

to address the process and mechanisms for enabling private data to flow across borders despite legal differences, perhaps based on findings of equivalence or adequacy. Likewise, rather than embrace specific legislative choices regarding copyright, TTIP could focus on processes for cooperating in enforcing existing laws against cross-border offenders. Alternatively, if TTIP nonetheless delves into substantive copyright law, it should promote a balanced approach that includes meaningful provisions on matters such as limitations and exceptions and intermediary safe harbors.

Of course, the line between substance and process is not always clear. Moreover, even arguably procedural questions regarding privacy and copyright are likely to raise complex and controversial questions. These are areas in which the details and specific language are crucial, and carry significant implications not just for commerce but for fundamental individual rights. The TTIP process should therefore provide an increased level of transparency regarding proposals under consideration in these areas. Specifically, at one or more appropriate points in the process, before any agreement is functionally final, negotiators should release draft text for public comment and input.

Without such transparency, TTIP negotiations may inadvertently foster the public impression that the agreement reflects an effort to sidestep or short-circuit legitimate, democratic legislative debate on topics of tremendous public interest and important individual rights. Already, some civil society groups are expressing precisely this fear, calling for privacy and intellectual property issues to be excluded from TTIP entirely.[2] To the extent TTIP addresses these issues, it should so in a manner that is both transparent and restrained.

II. Free Flow of Information

CDT would welcome the inclusion in TTIP of strong protections for the free cross-border flow of information on the Internet. Such provisions could benefit both the public's free expression interest in being able to send and receive information and the commercial interests of the United States' world-leading Internet and online services industries. Just as important, provisions on the free flow of information could serve as a positive model for other countries and for global Internet freedom generally.

Restrictions on the free flow of information on the Internet can take a variety of forms, including blocking of non-local content and services and requirements for local storage of certain types of data. To protect the free flow of information, CDT suggests that USTR consider pursuing provisions to:

- Explicitly acknowledge the importance of the free flow of information online to businesses and consumers, and assert that blocking cross-border provision of content and services is a trade barrier.

[2] TACD letter to Ambassador Ron Kirk and Commissioner Karel De Gucht, Mar. 5, 2013, http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=354&Itemid=40 (expressing view that "data flows and data protection must not be included in free trade negotiations"); *IP Out of TAFTA: Civil Society Declaration,* http://www.citizen.org/documents/IP%20out%20of%20TAFTA%20with%20Logos-revisednew.pdf.

- Codify principles 2, 3, and 4 of the 2011 EU-US Trade Principles for Information and Communication Technology Services.[3] These principles include statements that governments should promote the ability of consumers to access and distribute the information, applications, and services of their choice; should not restrict the cross-border provision of services; should not prevent cross-border transfers of and access to information; and should not require service suppliers to use local infrastructure or establish a local presence. Turning these non-binding principles into actual trade commitments would be a useful step.

- Ensure strong protections for Internet intermediaries against liability for the expression and activities of users. Internet intermediaries are key enablers of the free flow of information online, because they provide the conduits, platforms, and tools for a robust variety of user-generated communication. Without liability protection, however, intermediaries are forced to restrict and censor users' communications and expression, or pare back user-empowering communications capabilities entirely, in an effort to minimize the intermediaries' own liability risk. Moreover, uneven treatment of intermediaries creates significant uncertainty for Internet-based businesses looking to expand from the United States into the global marketplace.

  The US and EU both have enacted strong protections for intermediaries.[4] But there are still occasional examples of European countries seeking to hold intermediaries responsible for their users' behavior, such as Italy's 2010 criminal conviction (finally overturned on appeal in late 2012) of three Google executives for a user-posted video.[5] TTIP should include a commitment to protect Internet intermediaries against liability with respect to information that the intermediary does not create, substantively modify, or select. In addition, TTIP should reaffirm the legal principle, common to the US and EU, that Internet intermediaries shall not be legally obligated to monitor the user communications they transmit or store.[6]

- Prohibit governments from imposing "sending party pays" or other fee regimes that would burden and discourage interconnection and data flows between networks. As CDT explained in detail in response to a proposal by European telecommunications carriers last year, any imposition of a sending- party-pays regime would, among other problems, chill the online flow of information and risk fragmenting the Internet.[7]

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[3] *European Union-United States Trade Principles for Information and Communication Technology Services,* Apr. 4, 2011, http://www.ustr.gov/webfm_send/2780.

[4] *See* 47 USC § 230; 47 USC § 512; EU Directive 2000/31/EC ("E-Commerce Directive") Articles 12-14.

[5] *See* Leslie Harris, "Deep Impact: Italy's Conviction of Google Execs Threatens Global Internet Freedom," *HuffPost Tech,* Feb. 24, 2010, http://www.huffingtonpost.com/leslie-harris/deep-impact-italys-convic_b_474648.html; Eric Pfanner, "Italian Appeals Court Acquits 3 Google Executives in Privacy Cast, *N.Y. Times,* Dec. 21, 2012, http://www.nytimes.com/2012/12/22/business/global/italian-appeals-court-acquits-3-google-executives-in-privacy-case.html.

[6] E-Commerce Directive Article 15; 47 USC § 512(m)(1).

[7] CDT, *ETNO Proposal Threatens To Impair Access to Open, Global Internet,* June 21, 2012, https://www.cdt.org/files/pdfs/CDT_Analysis_ETNO_Proposal.pdf.

- Prohibit governments from applying traditional broadcast media laws to online platforms.[8] Rules for traditional broadcast media (radio and television) have in many countries been more restrictive than rules for other media, proscribing certain content and imposing licensing requirements. Given the abundant and user-controlled nature of Internet-based content, broadcast rules would be a poor fit. Extending broadcast rules to the transmission of content and information over the Internet would significantly chill the free flow of information online and across borders.

III. Data Protection / Privacy

An important but controversial issue affecting the free flow of information concerns the differences in the data protection regimes in the US and EU. Those differences – the US currently lacks horizontal data protection legislation, whereas the EU enacted generally applicable data protection standards in 1995 and is currently developing a new Data Protection Regulation – could impair the exchange of information defined as personal data under the European legislation. This is a significant commercial issue and may therefore prompt calls for TTIP to address questions of data protection and privacy.

CDT believes TTIP should take a cautious and limited approach to data protection and privacy. This is an area of very active democratic debate on both sides of the Atlantic. The Obama Administration has proposed a "Consumer Privacy Bill of Rights"[9] and is spearheading a series of multistakeholder negotiations aimed at developing appropriate codes of conduct.[10] The EU is in the process of crafting an ambitious rewrite of its data protection framework. With so much in flux, TTIP needs to avoid both the reality and the appearance of attempting to preempt or bypass the regular democratic process on these issues.

It would be particularly inappropriate for TTIP to include data protection provisions that effectively diminish the privacy rights or protections afforded to individuals. Trade negotiators should not be in the position of negotiating down privacy or other individual rights enjoyed by citizens. Nor should a commitment to free flow of information across borders create an easy path for circumventing democratically established data protection rules. For example, a company should not be able to evade one jurisdiction's privacy laws merely by transferring personal data to servers located in another jurisdiction.

For these reasons, TTIP should steer clear of commitments concerning the substance of data protection regimes. The TTIP trade negotiation process is not a suitable forum for

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[8] For example, Italian regulators decided in late 2010 to impose that broadcast regulations on video-hosting websites. *See* Wendy Zeldin, "Italy: Video-Sharing Sites to Be Viewed by the Law as Television Broadcasters," *Library of Congress Global Legal Monitor,* Jan. 13, 2011, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402469_text.

[9] *See* Danny Weitzner, "We Can't Wait: Obama Administration Calls for a Consumer Privacy Bill of Rights for the Digital Age," *The White House Blog,* Feb. 23, 2012, http://www.whitehouse.gov/blog/2012/02/23/we-can-t-wait-obama-administration-calls-consumer-privacy-bill-rights-digital-age.

[10] *See* Lawrence E. Strickling, "Putting the Consumer Privacy Bill of Rights into Practice," *NTIA Blog,* June 15, 2012, http://www.ntia.doc.gov/blog/2012/putting-consumer-privacy-bill-rights-practice.

harmonizing or otherwise making decisions about substantive rights, rules, and protections in the area of privacy.

Instead, TTIP negotiations should consider how to develop a process for enabling transatlantic commerce and data flows in manner that respects and will not undermine the different substantive policy choices the EU and US may make in the area of data protection. Under existing EU law, the US-EU Safe Harbor has provided a mechanism for addressing this challenge.[11] With the forthcoming EU Data Privacy Regulation and now the prospect of TTIP, a new or updated mechanism may be called for. In the absence of a generally applicable US privacy statute, there need to be ways to afford US companies certainty that their practices concerning personal data will be deemed adequate or equivalent under EU rules.

This is not a simple or easy matter. Negotiating a mechanism for defining adequacy or equivalence comes very close to determining citizens' individual rights. TTIP certainly should not include provisions designed to lower the substantive thresholds for adequacy or equivalence. At a minimum, however, TTIP should feature a procedural commitment to reach a workable solution to this problem.

IV. Copyright

Like privacy, copyright is an area in which the substantive legal framework is the subject of very active public and legislative debate. The intense public reactions to SOPA and PIPA in the United States and ACTA in Europe demonstrate both the controversial nature and the high level of popular interest in the shape of the copyright regime.[12] More recently, the head of the US Copyright Office has publicly said that the time has come for a major rewrite of the Copyright Act,[13] and the Chairman of the House Judiciary Committee has announced plans to launch a comprehensive review of US copyright law.[14] The European Commission, meanwhile, has launched a stakeholder dialogue aimed at updating the EU's copyright framework and has been reviewing the EU's IP Rights Enforcement Directive.[15]

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[11] *See U.S.-EU Safe Harbor Overview,* http://export.gov/safeharbor/eu/eg_main_018476.asp.

[12] *See* Leslie Harris, "PIPA/SOPA and the Online Tsunami: A First Draft of the Future," *ABC News,* Feb. 2, 2012, http://abcnews.go.com/Technology/pipa-sopa-online-tsunami-draft-future/story?id=15500925#.UYvxwL9YyfS; David Sohn, "As ACTA Tanks in Europe, USTR Announces Potentially Important Shift for TPP Talks," *CDT Policy Beta Blog,* July 5, 2012, https://www.cdt.org/blogs/david-sohn/0507acta-tanks-europe-ustr-announces-potentially-important-shift-tpp-talks.

[13] Maria A. Pallante, *The Next Great Copyright Act,* http://www.copyright.gov/docs/next_great_copyright_act.pdf; *see also* David Sohn, "Copyright Office Calls for Major Reforms to Copyright Law," *CDT Policy Beta Blog*, Mar. 21, 2013, https://www.cdt.org/blogs/david-sohn/2103copyright-office-calls-major-reforms-copyright-law.

[14] House Committee on the Judiciary, "Chairman Goodlatte Announces Comprehensive Review of Copyright Law," Apr. 24, 2013, http://judiciary.house.gov/news/2013/04242013_2.html.

[15] *See* "Commission agrees way forward for modernising copyright in the digital economy," MEMO/12/950, Dec. 5, 2012, http://europa.eu/rapid/press-release_MEMO-12-950_en.htm; European Commission, "The Directive of the enforcement of intellectual property rights," http://ec.europa.eu/internal_market/iprenforcement/directive/index_en.htm.

In light of all this activity through the regular democratic and legislative process, TTIP negotiators should be wary of addressing substantive matters of copyright law. Provisions based on current US law, for example, could later prove ill-considered or unwieldy if Congress pursues fundamental reforms to the copyright statute. Indeed, they could even serve as serious obstacles to legislative reform, effectively locking in by international agreement substantive copyright provisions that Congress might soon wish to revise.

Above all, addressing the substantive legal rules of copyright in a non-public, trade negotiation process would fuel suspicion that TTIP's copyright provisions reflect an effort to bypass or short-circuit the regular democratic process on these issues. Public distrust of copyright policymaking is already running high, which undermines respect for copyright law generally and complicates efforts to improve copyright compliance and enforcement. TTIP should take care not to exacerbate this problem.

TTIP's goals for copyright should therefore be limited – a suggestion consistent with the report of the High Level Working Group, which called for exploration of a "limited number" of intellectual property issues rather than a broad IPR accord.[16] Given that the US and EU both have well-developed copyright law regimes, a broad substantive copyright chapter seems unnecessary in any event. TTIP's copyright provisions could focus instead on more procedural enforcement questions, such as cooperation to facilitate enforcement against serious cross-border violators of whatever substantive legal rules the US and EU choose to enact now or in the future.

CDT strongly urges against wading into questions of substantive copyright law. But if TTIP negotiators nevertheless go down that path, it would be imperative to include provisions to ensure an appropriate balance among the needs of content creators, the needs of the information- and technology-using public, and societal values such as free speech.

In particular, it would be essential to include affirmative commitments regarding robust limitations and exceptions (L&Es) to the scope of copyright. L&Es are as much a core part of a sound copyright regime as provisions securing rights and enabling enforcement. In the US, the "fair use" limitation set forth in section 107 of the Copyright Act has been essential to both free expression and a wide range of technological innovation and commerce. Promoting and extending similar or comparable speech- and innovation-enabling copyright provisions beyond US borders would be a beneficial negotiating objective. Conversely, a TTIP in which rights and enforcement commitments were mandatory but L&Es were weak or optional would effectively promote a skewed, one-sided vision of copyright law.[17] L&Es need to be a central feature of any balanced approach to copyright.

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[16] *Final Report of the High Level Working Group on Jobs and Growth*, Feb. 11, 2013, http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/final-report-us-eu-hlwg.

[17] *See* CDT, *ACTA Debate Gets Specific*, May 18, 2010, https://www.cdt.org/policy/acta-debate-gets-specific.

TTIP could also include provisions reaffirming shared legal principles regarding the role of Internet intermediaries with respect to copyright infringement by users. The DMCA and the E-Commerce Directive both include safe harbor provisions that protect a range of intermediaries from liability for user behavior.[18] Both laws expressly state that intermediaries need not actively monitor user communications in order to detect unlawful activity.[19] These provisions give online intermediaries – such as social networks, photo- and video-sharing sites, blogging platforms, and a wide variety of other tools and services – the legal certainty necessary to offer innovative communications services that expand the space for commerce and free expression online. Their faithful implementation is essential for cross-border provision of Internet-based services.

Individual European jurisdictions, however, have not always adhered to these principles. For example, some courts, as in the Italian case referenced above,[20] have denied safe harbor protection to services they characterize as "active hosting." Limiting protection to platforms that provide only bare-bones hosting would effectively exclude most current and emerging hosting services, making the safe harbor irrelevant for most of the hosting ecosystem. US courts have firmly rejected efforts to hobble the safe harbor protections in this fashion.[21]

Meanwhile, other European courts have imposed "notice-and-stay-down" or website blocking requirements that effectively force content hosts or ISPs to monitor all user activity or traffic.[22] After all, the only way to ensure that specific content or websites are blocked is to scrutinize the activity of all users on a real-time basis, so that to the targeted material can be identified. This constitutes a back-door route to imposing the type of affirmative monitoring obligations that US and EU law expressly reject. Given this history, it could be useful for USTR to use TTIP to reaffirm shared US and EU commitments to meaningful safe harbors without monitoring requirements.

Finally, the E-Commerce Directive safe harbor, unlike the DMCA, does not expressly cover information location tools such as search engines and online directories. Many EU member states have extended safe harbors to them anyway, recognizing their importance to the functioning of the Internet.[23] USTR could seek TTIP language endorsing the inclusion of information location tools in safe harbor provisions.

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[18] E-Commerce Directive, Articles 12-14; 17 USC § 512(a)-(d).

[19] 17 USC § 512(m)(1); E-Commerce Directive Article 15. *See also Viacom Int'l v. YouTube,* 07 Civ. 2103 (LLS) (S.D.N.Y. Apr. 18, 2013) (reaffirming that YouTube had no legal obligation to search its website for infringing videos posted by users); *SABAM v. Scarlet,* ECJ C-70/10 (Nov. 24, 2011) (overturning an injunction requiring an ISP to filter user traffic in order to block transmissions of certain songs, on the ground that the injunction constituted a monitoring obligation in violation of ECD Article 15); *SABAM v. Netlog,* ECJ C-360/10 (Feb. 16, 2012) (rejecting an injunction requiring a social networking website to scan user-posted content on an ongoing basis to identify certain songs).

[20] *See supra* note 5.

[21] *See Viacom Int'l v. YouTube,* 676 F.3d 19 (2d Cir. 2012); *UMG Recordings v. Shelter Capital Partners,* 667 F.3d 1022 (9th Cir. 2011).

[22] *See* CDT, *Cases Wrestle with Role of Online Intermediaries in Fighting Copyright Infringement,* June 26, 2012, https://www.cdt.org/policy/cases-wrestle-role-online-intermediaries-fighting-copyright-infringement.

[23] European Commission, First Report on the application of Directive 2000/31/EC, p. 13.

V. Transparency

Even if TTIP pursues appropriately limited objectives regarding data protection and copyright, these are areas where draft text should be made available for public comment at one or more times before it is functionally final.

CDT recognizes that full, real-time transparency may not be conducive to successful trade negotiations. But by the same token, some issues are not be well suited to resolution through deals cut behind closed doors. Data protection and copyright policy affect individual citizens' rights of privacy and free expression. They are also areas in which mere outlines or high-level descriptions of proposals are of limited utility, given the delicate balance and often-complex interactions between different legal provisions. In short, the details of actual language are likely to matter a great deal. This is likely to be true even if TTIP negotiators seek to focus on matters of process and equal treatment rather than substantive law; the line between substance and process is often not clear.

In the absence of an opportunity to comment on actual text, critics will charge that specific industries may be using the trade agreement process to try to achieve goals that would be unattainable in an open and public process. Public distrust of the policymaking process and the legal regime, which is already a serious problem in the field of copyright, will increase. Just as important, TTIP negotiators will be deprived of the benefit of input from the full range of stakeholders in assessing the likely legal and practical impact of proposals.

It may be that some parties would use publicly released text as a focal point for rallying opposition, rather than advocating constructive changes. But that is a common feature of democratic decisionmaking. It is no reason to deny the opportunity for public input and feedback about the legal and practical implications of proposed language on matters of significant import for individual rights.

In short, transparency and public input are essential for TTIP's provisions on privacy and copyright – both for getting the substance of the agreement right, and for getting the public to accept the resulting provisions as legitimate. This is true regardless of whether TTTIP negotiators pursue limited and largely procedural commitments in these areas, as CDT believes they should, and becomes all the more essential to the extent that TTIP strays into arguably more substantive matters. There is no reason why the US and EU could not jointly agree that privacy and copyright are suitable areas for the public release of draft text and an opportunity for public comment.

Respectfully submitted,

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